130-263

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 221.

THE UNITED STATES, APPELLANT,

vs.

MARTHA INSLEY, (FORMERLY MARTHA PALMER), LAURA GUELICK (FORMERLY LAURA PALMER), ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS

FILED FEBRUARY 2, 1888.

by appeal from his decision. Though the period of publication on application for patent for the Clara mining claim had passed before the location of the Central, and appellant could not have become an adverse claimant in that application, the rules of the Land Department have always permitted one interested to become a protestant, and oppose the granting of a patent, so far as to show the applicant had not complied with laws and customs, and hence had no right to the patent. A reference to the dates will show this remedy, if there was any wrong to be be remedied, was open from August 6th, 1876, to February 6, 1880, and it is submitted that was the proper course to take to be heard on questions of fact within the sole jurisdiction of the commissioner.

This court has so often had occasion to decide under what circumstances a patent is void, and when and how voidable, and how far and in what cases the decision of the commissioner is final on questions of fact within his jurisdiction, that citations are scarcely required, but the following cases bear on these questions:

Steel vs. Smelting Co., 106 U. S., 447.
Smelting Co. vs. Kemp, 104 U. S. 636.
French vs. Ryan, 93 U. S. 169.
Patterson vs. Tatum, 3 Sawyer 164.

The case is submitted for the appellee on the foregoing propositions:

That the complaint is insufficient to justify a collateral attack on the patent.

That the decision is right on the merits. That if the patent was granted on an erroneous construction of the by-laws of the district, the error relates to a question of fact and the evidence to establish a fact within the jurisdiction of the land officers, and the decision cannot be collaterally attacked by this plaintiff or in this form of action.

CHARLES W. BENNETT,
Attorney for Appellee.

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1 UNITED STATES OF AMERICA,
District of Kansas, ss:

In the circuit court of the United States for the district of Kansas.

THE UNITED STATES, PLAINTIFF,
vs.
MRS. MARTHA INSLEY, FORMERLY MARTHA Palmer, Mrs. Laura Guelick, formerly Laura Palmer, Mrs. Barbury R. Insley, formerly Barbury R. Palmer, and James M. Palmer, heirs-at-law of Polly Palmer, deceased; Mrs. Elizabeth McElroy, wife and heir-at-law of M. McElroy, deceased; and Eliza J. McElroy, Emma G. McElroy, Mary A. McElroy, Henry McElroy, Hilda McElroy, Moses McElroy, William McElroy, and Ethel McElroy, heirs-at-law of M. McElroy, deceased; and Mrs. Elizabeth McElroy, as administratrix of the estate of M. McElroy, deceased; and E. Nold, defendants.

Be it remembered, that on this day, to wit, November 28, 1884, the complainant, by its solicitor, filed in the clerk's office of said court its bill in said entitled suit; which said bill is in the words and figures following, to wit:

2 In the United States circuit court for the district of Kansas.

THE UNITED STATES, PLAINTIFF,
vs.
MRS. MARTHA INSLEY, FORMERLY MARTHA Palmer, Mrs. Luara Guelick, formerly Laura Palmer, Mrs. Barbury R. Insley, formerly Barbury R. Palmer, and James N. Palmer, heirs-at-law of Polly Palmer, deceased, Mrs. Elizabeth McElroy, wife and heir-at-law of M. McElroy, deceased, and Eliza J. McElroy, Emma G. McElroy, Mary A. McElroy, Henry McElroy, Hilda McElroy, Moses McElroy, William McElroy, and Ethel McElroy, heirs-at-law of M. McElroy, deceased, and Mrs. Elizabeth McElroy, as administratrix of the estate of M. McElroy, deceased, and E. Nold, defendants.

Bill in equity.

To the judges of the circuit court of the United States for the district of Kansas:

The United States brings this its bill against the defendants, all residents of the State of Kansas, and thereupon gives information and says: That on or about the 16th day of October, 1869, it recovered a judgment

at law in the United States district court for the district of Kansas, in a suit then pending, wherein complainant was plaintiff and one M. McElroy and Charles Bull were defendants. In said case judgment was rendered in favor of complainant, and against both of said defendants, for the sum of $2,000.00. That on or about the sixth day of November, 1869, execution was issued on said judgment, a levy made upon the property of
3 the defendant M. McElroy, which execution was afterwards returned unsatisfied for wants of bidders at said sale; that soon thereafter, to wit, on or about June ninth, 1870, a second execution issued on said judgment, and property belonging to defendant M. McElroy was levied on, but said property was unsold and said execution was returned unsatisfied, and said judgment still remained unsatisfied and unpaid.

Complainant further says: On or about the seventh day of August, 1869, said M. McElroy and his wife Elizabeth McElroy, defendant herein, made, executed, and delivered to one Polly Palmer their certain note and mortgage on lot one, in block one hundred and four [104] in the city of Fort Scott, Bourbon County, Kansas, to secure the sum of $3,500.0 theretofore advanced by said Polly Palmer to the said M. McElroy as a security therefor. Said note being unpaid, the said Polly Palmer, mortgagee, did, on the 30th day of May, 1871, institute a suit in the district court of Bourbon County, Kansas, wherein Polly Palmer was plaintiff, and said M. McElroy and his wife Elizabeth M. McElroy, defendant herein, were parties defendants. Said suit was brought to foreclose the above-mentioned mortgage. And on or about October 4th, 1871, judgment was rendered in said suit in favor of Polly Palmer, and against M. McElroy and his wife Elizabeth McElroy, for the sum of $3,764.16, and for a foreclosure of the mortgage and said sum was declared to be the first and best lien upon the above-described premises, and said property was ordered to be sold to satisfy the same. Soon thereafter special execution issued on said Palmer judgment, and levy was made upon the above-described property, which was afterwards sold by the sheriff of Bourbon County, Kansas, and bought in by said Polly Palmer, the judgment creditor, which sale was by the court confirmed and on January 4th, 1872, a sheriff's deed was executed and delivered to said Polly Palmer, and duly filed for record in the office of
the register of deeds of Bourbon County, Kansas. At the time
4 of the institution of the foreclosure proceedings above mentioned, instituted by the said Polly Palmer and against the said M. McElroy and wife, the complainant's judgment heretofore mentioned was a good and valid judgment in favor of the complainant and against the said McElroy, defendant in the said Polly Palmer suit, and was duly entered of record in the clerk's office in the United States district court of the State of Kansas; that execution had theretofore been issued, and the United States marshall had made a levy; and at the time above mentioned, to wit, May 30th, 1871, lot 1, block 104, city of Fort Scott, Kansas, was being advertised for sale, and was to have been sold on June 6th, 1871, at the front door of the court-house in the city of Fort Scott; that on said June 6th, 1871, said land was sold, and the complainant became the purchaser thereof, there being no other bidders at said sale. Said sale was afterwards, to wit, on October 16th, 1871, confirmed in the United States district court for the district of Kansas, and a deed was ordered to be made to the United States, the purchaser thereof.

Complainant further says in the above-mentioned suit brought by the said Polly Palmer in the district court of Bourbon County, Kansas, this complainant was not made a party defendant and in nowise appeared in said suit; that on said May 30th, 1871, complainant was a judgment creditor of said M. McElroy, and said judgment was a lien on the above-described real estate, the property of the said M. McElroy; that as such judgment creditor it brings this action for the purpose of redeeming said land from said Polly Palmer, mortgagee and purchaser as above.

Complainant further says that on or about the 13th of November, 1872, the said Polly Palmer died intestate, leaving as her sole surviving heirs at law the following-named children, to wit:

Mrs. Martha Insley, Mrs. Laura Guelick, Mrs. Barbury R. Insley, and James M. Palmer, all now over the age of 21 years.

That soon thereafter James M. Palmer was appointed administrator of her estate, qualified, gave bond, and entered upon the discharge of his duties as such administrator; that as such administrator he administered upon the estate of Polly Palmer, deceased, up until the year 1878, at which time he made final report to the probate court of his acts and doings as such administrator, and asked to be discharged, which was accordingly granted, and he was released as such administrator, and there is now no administrator of the estate of Polly Palmer, deceased.

In 1881 the said M. McElroy departed this life intestate, leaving as his sole surviving heirs at law his widow, Elizabeth McElroy, defendant herein, and the following-named children, to wit:

Eliza J. McElroy, aged 20 years,
Emma G. McElroy, " 18 "
Mary A. McElroy, " 17 "
Henry McElroy, " 15 "
Hilda McElroy, " 12 "
Moses McElroy, " 10 "
William McElroy, " 6 " and
Ethel McElroy, " 3 "

That soon thereafter, to wit, on or about September 1st, 1881, the said Elizabeth McElroy was appointed, qualified, gave bond, and entered upon the discharge of her duties as the administratrix of the estate of M. McElroy, deceased, and is now the administratrix of the estate of said M. McElroy, deceased.

Complainant says it has made due and proper demand upon defendants that they disclose the amount still due and unpaid, if any, on said Polly Palmer mortgage of date August 7th, 1869, and on the judgment of foreclosure thereof, in order that complainant could pay the same to the party entitled thereto; and the defendants failed and refused to give the same, and claimed that complainant had no right or interest in and to said lot one (1), block one hundred and four (104), and had no right to redeem the same.

Complainant further says that it is now, and ever has been ready and willing at all times to pay the amount necessary to redeem said land from said mortgage, and now here comes into court and is ready and willing, and offers what, if anything, shall appear to remain due in respect to the principal and interest on said mortgage in order to redeem said property therefrom and from the judgment of foreclosure rendered thereon.

Complainant further says that on or about the 30th day of October, 1883, it received a deed for said lot one (1), block one hundred and four (104), from Hon. B. F. Simpson, United States marshal for the district of Kansas, based on the sale of June 6th, 1871, and is now and has been ever since said June 6th, 1871, the owner of said above-described land, with full right of possession thereof, subject only to the right of the estate and heirs at law of Polly Palmer, deceased.

The defendants and each of them claim to have some right, interest, or equity in and to said land adverse to complainant, but complainant says that whatever right, title, claim, interest, or equity the defendants or any of them have, or may claim to have in and to said land is junior, inferior, to that of complainant. Complainant further says the amount due to the estate of Polly Palmer, deceased, on said mortgage of date August 7th, 1869, and on said judgment of foreclosure thereof, has long since been paid.

7 Complainant further says there was a large brick and frame store building on said lot one (1), block one hundred and four (104), at the time it was levied on and sold to the United States, and at the time suit was brought by said Polly Palmer to foreclose her said mortgage, and that said McElroy was at the time in the possession thereof and carried on business therein for a number of years, and remained and continued in possession thereof during all of said time, and up to the time of his death, in and about the management of said business, and paid taxes thereon all of said years, and that no possession of said premises was taken by said Polly Palmer when said sheriff's deed was given to her, and that the annual rental value of said lot one (1), block one hundred and four (104), was and ever since has been $500.00 per year, and that said annual sum of $500.00 should be applied by said defendants in satisfaction of the amount due, if anything, to the estate of said Polly Palmer, deceased, from said M. McElroy, deceased.

By the strict rules of the common law, complainant has no adequate and sufficient remedy whereby complete and perfect justice can be done, and brings this action for an accounting between the parties hereto and to redeem said land from said mortgage, and the judgment and foreclosure thereunder and for possession thereof.

In consideration whereof and forasmuch as your orator can only have adequate relief in the premises in this honorable court, where matters of this nature are properly cognizable and relievable, your orator solicits the aid of this court to compel said defendants a full, true, and perfect answer to make to all and singular the statements and charges above set forth, answers under oath, however, being hereby expressly waived by said complainant as to each of said defendants; and that an account may be taken

8 of what, if anything, is due to the said Martha Insley, Laura Guelick, Barbary R. Insley, and James M. Palmer, defendants, and heirs of Polly Palmer, deceased, for principal and interest on said mortgage debt; and that an accounting may also be taken of the rents and profits of said above-described premises, the property of complainant, which have been possessed or received by said defendants, heirs of Polly Palmer, deceased, or by their order or for their use, or which without their wilful fault or neglect may have been received; and that if it shall appear that said rents and profits have been more than sufficient to satisfy the

principal and interest of said mortgage debt, that the said defendants be decreed to pay the excess to your orater, and that complainant be permitted to redeem said property, it being ready and willing to pay whatever, if anything, shall appear to remain due in respect to principal and interest on said mortgage debt; and that the defendants may be adjudged to deliver up the possession of the above-described premises to complainant or to such persons as it shall direct, free from all incumbrances made by defendants or any of them or any persons claiming by, through, or under them, and for such other, further, or different relief as the court shall in equity see proper to grant.

And may it please your honors to grant unto your orator a writ of subpœna, issued under the seal of this court, directed to said Martha Insley (formerly Martha Palmer); Laura Guelick (formerly Laura Palmer); Barbury R. Insley (formerly Barbury R. Palmer); James M. Palmer, heirs at law of Poliy Palmer, deceased; Elizabeth McElroy, wife and heir at law of M. McElroy, deceased; Eliza J. McElroy, Emma G. McElroy, Mary A. McElroy, Henry McElroy, Hilda McElroy, Moses McElroy, William McElroy, and Ethel McElroy, heirs at law of M. McElroy, deceased, and Mrs. Elizabeth McElroy, as administratrix of the estate of M. McElroy, deceased, and E. Nold, therein and thereby com-

9 manding them on a certain day and under a certain penalty therein to be limited, personally to be and appear before your honors in this honorable court, and then and there full, true, direct, and perfect answer make to all and singular the premises, and, further, to stand to, perform, and abide by such further order, direction, and decree herein as to your honors shall seem meet.

And your orator will ever pray.

J. R. HALLOWELL,
United States Att'y & Solicitor for Complainant.

CHAS. B. SMITH & C. L. WARE,
Of Counsel.

(Endorsed:) No. 4896. United States vs. Mrs. Elizabeth McElroy et al. Bill in equity. Filed Nov. 28, 1884. A. S. Thomas, clerk, by Frank J. Thomas, deputy. J. R. Hallowell, C. B. Smith, & C. L. Ware.

Chancery subpœna.

10 UNITED STATES OF AMERICA,
District of Kansas, ss:

The United States of America, to Martha Insley (formerly Martha Palmer; Laura Guelick (formerly Laura Palmer); Barbury R. Insley (formerly Barbury R. Palmer); James M. Palmer, heirs at law of Polly Palmer, deceased; Elizabeth McElroy, wife and heir at law of M. McElroy, deceased, Eliza J. McElroy, Emma G. McElroy, Mary A. McElroy, Henry McElroy, Hilda McElroy, Moses McElroy, William McElroy, and Ethel McElroy, heirs at law of M. McElroy, deceased, and Mrs. Elizabeth McElroy, as administratrix of the estate of M. McElroy, deceased, and E. Nold, greeting:

We command you and every of you that you appear before our judge of our circuit court of the United States of America for the district of

Kansas, at the city of Topeka, in said district, on the first Monday in the month of January next, to answer the bill of complaint of the United States this day filed in the clerk's office of said court, in said city of Topeka, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the marshal of the district of Kansas to execute.

Witness the Hon. Morrison R. Waite, Chief-Justice of the Supreme Court of the United States of America, at the city of Topeka, in said district, this 28th day of Nov., in the year of our Lord one thousand eight hundred and eighty-four.

[SEAL.]

A. S. THOMAS, *Clerk.*
By FRANK J. THOMAS,
Deputy.

MEMORANDUM.—The above named defendants are notified that unless they enter their appearance in the clerk's office of said court, at the city of Topeka aforesaid, on or before the day to which the above writ is returnable, the complaint will be taken against them as confessed, and a decree entered accordingly.

A. S. THOMAS, *Clerk*
By FRANK J. THOMAS,
Deputy.

10½ *U. S. marshal's return.*

DISTRICT OF KANSAS, *ss:*

Received the within writ November the 28, 1884, and executed the same as follows, to wit: Served on the within-named defendants at the county of Bourbon, State and district of Kansas, on the 4 day of December, 1884, by delivering to the within-named defendants, James M. Palmer, Mrs. Elizabeth McElroy, wife of M. McElroy, deceased, Emma G. McElroy, Mary A. McElroy, Hilda McElroy, William McElroy, Ethel McElroy, Mrs. Elizabeth McElroy, administratrix of the estate of M. McElroy, deceased, each a true and certified copy of this writ, with all the endorsements thereon; at the same time and place I left at the usual place of abode of the within-named defendants, Eliza J. McElroy, Henry McElroy, Moses McElroy, and with an adult member of their family, to wit, Mrs. Elizabeth McElroy, their mother, for each of them, another like copy of this writ at the same time and place I left at the usual place of abode of the within-named defendant, E. Nold, and with an adult member of his family, to wit, Mrs. Nold, for him, the said E. Nold, another like copy of this, writ; at the same time and place I delivered to Mrs. Elizabeth McElroy, guardian of the minor heirs of the estate of M. McElroy, deceased, for said minor heirs, another like copy of this writ; the within-named defendants, Martha Insley, Laura Guelick, and Barbara Insley, not found in my State and district of Kansas.

B. F. SIMPSON,
U. S. Marshal.
By S. P. WADE,
Deputy.

Service	$24. 00
Travel	10. 50
	$34. 50

(Indorsed:) No. 4896. Circuit court United States, district of Kansas. The United States vs. Mrs. Elizabeth McElroy et al. Chancery subpœna. Returnable to rule day, first Monday in January, A. D. 1885. A. S. Thomas, clerk. By Frank J. Thomas, deputy clerk. Filed Dec. 6, A. D. 1884. A. S. Thomas, clerk. By Frank N. Holt, deputy clerk. J. R. Hallowell, C. B. Smith, & E. L. Ware, compt.'s sol.

11 In the United States circuit court for the district of Kansas.

THE UNITED STATES, COMPL'T,
vs.
MRS. MARTHA INSLEY, FORMERLY MARTHA Palmer, Mrs. Laura Guelick, formerly Laura Palmer, Mrs. Barbara R. Insley, formerly Barbara R. Palmer, James M. Palmer, heirs at law of Polly Palmer, deceased, and Eliza J. McElroy, Emma G. McElroy, Mary A. McElroy, Henry McElroy, Hilda McElroy, Moses McElroy, William McElroy, and Ethel McElroy, heirs at law of Moses McElroy, deceased, and Mrs. Elizabeth McElroy as administratrix of the estate of M. McElroy, deceased, and E. Nold, def'ts. } Demurrer.

Demurrer of the above-named defendants, Elizabeth McElroy and James B. Palmer, to the bill of complaint of the above-named complainant.

These defendants by protestation not confessing or acknowledging all or any of the matters or things in the said bill of complaint contained to be true in such manner and form as the same are therein set forth and alleged, do jointly and severally demur to said bill.

And for cause of demurrer shows that it appears by the said complainant's own showing by the said bill that said complainant is not entitled to the relief prayed for by said bill against these defendants.

Wherefore and for divers good causes other of demurrer appear-
12 ing in the said bill these defendants demur thereto, and they pray the judgment of this honorable court whether they shall be compelled to make answer to the said bill, and they pray to be hence dismissed with their reasonable costs in this behalf expended.

J. D. MCCLEVERTY,
Def'ts' Sol.

(Endorsed:) No. 4896. The United States *vs.* Mrs. Martha Insley *et al.*, Mrs. Elizabeth McElroy *et al.* Demurrer. Filed Jan'y 24, 1885. A. S. Thomas, clerk, by Frank H. Holt, deputy. J. D. McCleverty, sol.

And on this day, to wit, February 16, 1885, the clerk of said court made an entry on the order book of said court in said entitled suit, which entry is in the words and figures following, to wit:

UNITED STATES
vs. } 4896.
MARTHA INSLEY ET AL.

Comes now the complainant, by Chas. B. Smith, its solicitor, and sets down for argument at March rules 1885, the demurrer of defendants to bill of complaint in above case.

13 In the United States circuit court for the district of Kansas.

THE UNITED STATES, PLAINTIFF,
vs.
MRS. MARTHA INSLEY, MRS. LAURA GUELICK, Mrs. Barbara R. Insley, James M. Palmer, Mrs. Elizabeth McElroy, Eliza J., Emma G., Mary A., Henry, Hilda, Moses, William, and Ethel McElroy, children & heirs at law of M. McElroy, dec'd, Mrs. Elizabeth, admi's'x, & E. Nold, defendant.

Motion.

Now comes the plaintiff and represents and shows to the court that the following-named defendants, children & heirs of M. McElroy, deceased, are minors, to wit:

Henry McElroy, aged about 18 years,
Hilda McElroy, " " 15 "
Moses McElroy, " " 13 "
William McElroy, " " 9 " and
Ethel McElroy, " " 6 "

Your petitioner further says that due, proper, and sufficient personal service of summons was had upon each of said defendents, & more than 30 days have elapsed since the service; that they have made no appearance in the case, and your petitioner asks that a guardian ad litem be appointed to care for and represent said defendants in this cause.

E. L. WARE,
Of Counsel for Complainant.

14 (Endorsed:) No. 4896. United States vs. McElroy et al. Motion for appointment of guardian ad litem. Filed June 6, 1885. A. S. Thomas, clerk, by Frank J. Thomas, deputy.

UNITED STATES OF AMERICA,
District of Kansas, ss:

At a term of the circuit court of the United States for the district of Kansas, begun and held at the city of Leavenworth, in said district, on

Monday, the first day of June, 1885, proceedings were had, and appear of racord, in words and figures following, to wit:

SATURDAY, *June* 6, 1885.

THE UNITED STATES
vs. } 4896.
MRS. MARTHA INSLEY ET AL.

It is ordered by the court that the complainant have thirty days from this date to amend its bill herein, and that defendants have thirty days thereafter to answer. And the complainant makes application for the appointment of a guardian ad litem for and on behalf of Henry McElroy, Hilda McElroy, Moses McElroy, William McElroy, and Ethel McElroy, minor defendants herein.

On consideration whereof it is now by the court here ordered that J. D. McCleverty be and is now appointed guardian ad litem of and for said minor defendants, Henry McElroy, Hilda McElroy, Moses McElroy, William McElroy, and Ethel McElroy, for them and in their behalf.

15 In the circuit court of the United States, district of Kansas.

THE UNITED STATES OF AMERICA, COMPLAINANT,
vs. } No. ——.
MRS. MARTHA INSLEY, ET AL. DEFENDANTS.

And now comes the complainant herein, by its solicitors, J. R. Hallowell, C. B. Smith, and C. L. Ware, and moves the court here for an order to be served upon defendants, absent from, and upon whom service can not be made within the said district, and who have not voluntarily appeared hereto, directing them to appear, plead, answer, or demur to said complainant's bill of complaint; and, as a showing for such order, complainant submits the subjoined affidavit.

J. R. HALLOWELL,
C. B. SMITH, &
C. L. WARE,
Att'ys for Complainant.

UNITED STATES OF AMERICA,
District of Kansas, ss:

C. L. Ware, being first duly sworn, deposes and says, that he is one of the solicitors for complainant in the above-entitled action; that the above-entitled suit is brought to enforce a lien upon certain real estate described in complainant's bill of complaint, and situate within the Strte and district of Kansas; that the defendants, Martha J. Insley, Mrs. Laura Guelick, & Mrs. Barbary R. Insley, are not inhabitant of nor can they be found within the said district of Kansas; and that said defendants do not voluntarily appear to said bill of complaint; and that the residence of said defendants is unknown.

C. L. WARE.

And on this day, to wit, February 16, 1885, the clerk of said court made an entry on the order book of said court in said entitled suit, which entry is in the words and figures following, to wit:

UNITED STATES
vs. } 4896.
MARTHA INSLEY ET AL.

Comes now the complainant, by Chas. B. Smith, its solicitor, and sets down for argument at March rules 1885, the demurrer of defendants to bill of complaint in above case.

13 In the United States circuit court for the district of Kansas.

THE UNITED STATES, PLAINTIFF,
vs.
MRS. MARTHA INSLEY, MRS. LAURA GUELICK, Mrs. Barbara R. Insley, James M. Palmer, Mrs. Elizabeth McElroy, Eliza J., Emma G., Mary A., Henry, Hilda, Moses, William, and Ethel McElroy, children & heirs at law of M. McElroy, dec'd, Mrs. Elizabeth, admi's'x, & E. Nold, defendant.

Motion.

Now comes the plaintiff and represents and shows to the court that the following-named defendants, children & heirs of M. McElroy, deceased, are minors, to wit:

Henry McElroy, aged about 18 years,
Hilda McElroy, " " 15 "
Moses McElroy, " " 13 "
William McElroy, " " 9 " and
Ethel McElroy, " " 6 "

Your petitioner further says that due, proper, and sufficient personal service of summons was had upon each of said defendents, & more than 30 days have elapsed since the service; that they have made no appearance in the case, and your petitioner asks that a guardian ad litem be appointed to care for and represent said defendants in this cause.

E. L. WARE,
Of Counsel for Complainant.

14 (Endorsed:) No. 4896. United States vs. McElroy et al. Motion for appointment of guardian ad litem. Filed June 6, 1885. A. S. Thomas, clerk, by Frank J. Thomas, deputy.

UNITED STATES OF AMERICA,
District of Kansas, ss:

At a term of the circuit court of the United States for the district of Kansas, begun and held at the city of Leavenworth, in said district, on

Monday, the first day of June, 1885, proceedings were had, and appear of racord, in words and figures following, to wit:

SATURDAY, *June* 6, 1885.

THE UNITED STATES
vs. } 4896.
MRS. MARTHA INSLEY ET AL.

It is ordered by the court that the complainant have thirty days from this date to amend its bill herein, and that defendants have thirty days thereafter to answer. And the complainant makes application for the appointment of a guardian ad litem for and on behalf of Henry McElroy, Hilda McElroy, Moses McElroy, William McElroy, and Ethel McElroy, minor defendants herein.

On consideration whereof it is now by the court here ordered that J. D. McCleverty be and is now appointed guardian ad litem of and for said minor defendants, Henry McElroy, Hilda McElroy, Moses McElroy, William McElroy, and Ethel McElroy, for them and in their behalf.

15 In the circuit court of the United States, district of Kansas.

THE UNITED STATES OF AMERICA, COMPLAINANT,
vs. } No. ——.
MRS. MARTHA INSLEY, ET AL. DEFENDANTS.

And now comes the complainant herein, by its solicitors, J. R. Hallowell, C. B. Smith, and C. L. Ware, and moves the court here for an order to be served upon defendants, absent from, and upon whom service can not be made within the said district, and who have not voluntarily appeared hereto, directing them to appear, plead, answer, or demur to said complainant's bill of complaint; and, as a showing for such order, complainant submits the subjoined affidavit.

J. R. HALLOWELL,
C. B. SMITH, &
C. L. WARE,
Att'ys for Complainant.

UNITED STATES OF AMERICA,
District of Kansas, ss:

C. L. Ware, being first duly sworn, deposes and says, that he is one of the solicitors for complainant in the above-entitled action; that the above-entitled suit is brought to enforce a lien upon certain real estate described in complainant's bill of complaint, and situate within the Strte and district of Kansas; that the defendants, Martha J. Insley, Mrs. Laura Guelick, & Mrs. Barbary R. Insley, are not inhabitant of nor can they be found within the said district of Kansas; and that said defendants do not voluntarily appear to said bill of complaint; and that the residence of said defendants is unknown.

C. L. WARE.

Subscribed and sworn to before me this 11th day of June, A. D. 1885. My commission expires Jan'y 23d, 1889.
[SEAL.]

C. E. CORY,
Notary Public.

(Indorsed:) Circuit court U. S., district of . No. 4896. United States of America vs. Mrs. Martha Insley et al. Motion and affidavit for order, etc. Filed June 18, 1885. A. S. Thomas, clerk.

16 In the circuit court of the United States, district of Kansas.

THE UNITED STATES OF AMERICA, COMPLAINANT,
vs.
MRS. MARTHA INSLEY, MRS. LAURA GUELICK, Mrs. Barbara R. Insley, & Mrs. Elizabeth McElroy, et al., Defendant. } In chancery.

Order for appearance of absent defendant.

And now, on this day of June, 1885, being at the June term, A. D. 1885, of said court, it having been made to appear, to the satisfaction of said court, that this is a suit commenced to enforce a lien upon real property within said district, and that Mrs. Martha Insley, Mrs. Laura Guelick, and Mrs. Barbary R. Insley, the defendant herein, are not inhabitant of and have not been found within said district, and have not voluntarily appeared in this suit, on motion of C. L. Ware, solicitors for said complainant, it is considered by the court, and ordered, that said defendants above named be and they are hereby ordered and directed to appear and plead, answer, or demur to the complainant's bill of complaint, on or before the first Monday of September, A. D. 1885, being September rules, A. D. 1885, and that in default thereof, an order be entered in this cause taking said bill of complaint pro confesso. It is further ordered by the court that at least twenty (20) days before said rule day, a copy of this order be served upon the person or persons in possession or in charge of the real property described in complainant's bill of complaint, if any there be. And it appearing to the court that it is not practicable to serve said order upon said named defendants personally, it is further ordered that said order be served upon said defendants by publication thereof, for six consecutive weeks, once in each week, in the Topeka Commonwealth, a weekly newspaper published at Topeka, Kansas, in said district, the last publication to be at least twenty (20) days before said rule day.

C. G. FOSTER,
Judge.

(Indorsed:) Circuit court U. S., district of Kansas, No. 4896. The United States of America, vs. Martha Insley et al. Order for appearance of absent defendant. Filed June 18, 1885. A. S. Thomas, clerk.

17 And on this day, to wit, July 22, 1885, the complainant by its solicitors filed in the clerk's office of said court its amended bill of

complaint, which said amended bill of complaint is in the words and figures following, to wit:

In the United States circuit court for the district of Kansas.

THE UNITED STATES, COMPLAINANT,
vs.
JAMES M. PALMER AND ELIZABETH MCELROY et al., defendants.

Amended complaint.

To the judges of the circuit court of the United States for the district of Kansas:

Leave first had and obtained, the United States brings this its bill against the defendants, and thereupon gives information and says:

That on or about the 16 day of October, 1869, it recovered a judgment at law in the United States district court for the district of Kansas in a suit then pending wherein complainant was plaintiff and one Moses McElroy and Charles Bull were defendants. In said case judgment was rendered in favor of complainant and against both of said defendants for the sum of $2,000.00. That on or about the sixth day of November, 1869, execution issued on said judgment, a levy made upon the property of the defendant M. McElroy, which execution was afterwards returned unsatisfied for want of bidders at said sale. That soon thereafter, to wit, on or about
June 9, 1870, a second execution issued thereon and property be-
18 longing to defendant M. McElroy was levied on, but said property was unsold and said execution returned unsatisfied, and said judgment still remained unsatisfied and unpaid.

Complainant further says: On or about the 7th day of August, 1869, said McElroy, defendant, and his wife, Elizabeth McElroy, defendant herein, made, executed, and delivered to one Polly Palmer their certain note and mortgage on lots one and three in block No. one hundred and four, in the city of Fort Scott, Bourbon County, Kansas, to secure the sum of $3,500.00, theretofore advanced by said Polly Palmer to the said M. McElroy as a security therefor. Said note being unpaid, the said Polly Palmer, mortgagee, did, on the 30th day of May, 1871, institute a suit in the district court of Bourbon County, Kansas, wherein Polly Palmer, mortgagee, was plaintiff, and said M. McElroy and his wife, Elizabeth McElroy, defendant herein, were parties defendants. Said suit was brought to foreclose the above-mentioned mortgage, and on or about Oct. 4, 1871, judgment was rendered in said suit in favor of Polly Palmer and against said McElroy and his wife, Elizabeth McElroy, for the sum of $3.764.16, and for a foreclosure of the mortgage; and said sum was declared to be the first and best lien upon the above-described property, and said property was ordered to be sold to satisfy the same.

Soon thereafter special execution issued on said Palmer judgment and levy was made upon above-described property, which was afterwards sold by the sheriff of Bourbon County, Kansas, and bought in by Polly Palmer, the judgment creditor, which sale was by the court confirmed, and on Jan'y 4, 1872, a sheriff's deed was executed and delivered to said Polly Palmer

and duly filed for record in the office of the register of deeds of Bourbon County, Kansas. At the date of the institution of the foreclosure proceedings above mentioned, instituted by the said Polly Palmer, and
19 against the said M. McElroy and wife, the complainant's judgment heretofore mentioned, was a good and valid judgment in favor of complainant, and against the said M. McElroy, defendant in the said Polly Palmer suit, and was duly entered of record in the clerk's office in the United States district court of the State of Kansas; that execution had theretofore been issued and the United States marshal had made a levy, and at the time above mentioned, to wit, May 30, 1871, lots 1 and 3, in block 104, city of Fort Scott, Kansas, was being advertised for sale, and was to have been sold on June 6, 1871, at the front door of the court-house, in the city of Fort Scott; that on said June 6, 1871, lot 1, block 104, was sold. The complainant became the purchaser thereof, there being no other bidders at said sale. Said sale was afterwards, to wit, on October 16, 1871, confirmed in the U. S. district court for the district, and a deed ordered to be made to the United States, the purchaser thereof.

Complainant further says in the above-mentioned suit brought by the said Polly Palmer in the district court of Bourbon County, Kansas, this complainant was not made a party defendant and in no way appeared in said suit; that on said May 30, 1871, complainant was a judgment creditor of said M. McElroy, and said judgment was a lien on all the above-described real estate, the property of the said M. McElroy; that as such judgment creditor it brings this action for the purpose of redeeming said land from said Polly Palmer, mortgagee and purchaser as above.

Complainant further says that on or about the 13th of November, 1872, the said Polly Palmer died intestate, leaving as her sole surviving heirs at law the following named children, to wit:

Mrs. Martha Insley, Mrs. Laura Guelick, Mrs. Barbury R. Insley, and James M. Palmer, all over the age of 21 years.

That soon thereafter James M. Palmer was appointed administra-
20 tor of her estate, qualified, gave bond, and entered upon the discharge of his duties as such administrator; that as such administrator he administered upon the estate of Polly Palmer, deceased, up until the year 1878, at which time he made final report to the probate court of his acts & doings as such administrator and asked to be discharged, which was accordingly granted, and he was released as such adm., and there is now no administrator of the estate of Polly Palmer, deceased.

In the year 1881 the said M. McElroy departed this life intestate, leaving as his sole surviving heirs at law his widow, Elizabeth McElroy, defendant herein, & the following named children, to wit:

Eliza J. McElroy,	aged	20 years.
Emma G. McElroy,	"	18 "
Mary A. McElroy,	"	17 "
Henry McElroy,	"	15 "
Hilda McElroy,	"	12 "
Moses McElroy,	"	10 "
William McElroy,	"	6 "
Ethel McElroy,	"	3 "

That soon thereafter, to wit, on or about Sept. 1, 1881, the said Elizabeth McElroy was appointed, qualified, gave bond, & entered upon the

discharge of her duties as the administratrix of the estate of M. McElroy, deceased, & is now the administratrix of the estate of said M. McElroy, deceased.

Complainant says it has made due & proper demand upon defendants that they disclose the amount still due and unpaid, if any, on said Polly Palmer mortgage of date Aug. 7, 1869, & on the judgment of foreclosure thereof, & defendants failed & refused to give the same & claimed that in order that complainant could pay the same to the party entitled there-
21 to, complainant had no right or interest in & to said lot 1, block 104, and had no right to redeem the same.

Complainant further says that it is now and ever has been ready and willing at all times to pay the amount necessary to redeem said lot 1, block 104, from said mortgage, and now here comes into court and is ready and willing, and offers what, if anything, shall appear to remain due in respect to the principal and interest on said mortgage in order to redeem said property therefrom and from the judgment of foreclosure rendered thereon.

Complainant further says that on or about the 30th day of October, 1883, it received a deed for lot 1, block 104, from Hon. B. F. Simpson, U. S. Marshal for the district of Kansas, based on the sale of June 6, 1871, in accordance with the order of court, dated October 16, 1871, and is now and has been ever since said June 6, 1871, the owner of said above-described land, with full right of possession thereof, subject only to the right of the estate and heirs at law of Polly Palmer, deceased.

The defendants, and each of them, claim to have some right, interest, or equity in and to said land adverse to complainant, but complainant says that whatever right, title, claim, interest, or equity the defendants, or any of them, may have or claim to have in and to said land, is junior, inferior, and subordinate to that of complainant.

Complainant further says the amount due to the estate of Polly Palmer, deceased, on said mortgage of date Aug. 7, 1869, and on said judgment of foreclosure thereof has long since been paid, and complainant asks that defendants be required to show what payments have been made thereon, and when such payments were made.

Complainant further says, there was a large brick store building on said lots 1, block 104, at the time it was leveid on and sold to the United States, and said lot 1, is now of the value of $8,000.00, and it was
22 on said lot at the time suit was brought by said Polly Palmer to foreclose her said mortgage, and that said M. McElroy was at the time in the possession thereof, and carried on business therein fora number of years, and remained and continued in possession thereof during all of said time and up to the time of his death in and about the management of said business, and paid taxes thereon all of said years, and that no possession of said premises was taken by said Polly Palmer when said sheriff's deed was given to her, and that the annual rental value of said lot 1, block 104, was and ever since has been $500.00 per year, and the rental value of lot 3, block 104, was and ever since has been $300.00 per year, and the annual rental value of said property has been $800.00 per year, and that said sum of $800.00 annually should be applied by defendants in satisfaction of the amount due, if anything be due, to the estate of said Polly Palmer, deceased, from said M. McElroy, deceased.

By the strict rules of common law complainant has no adequate and sufficient remedy whereby complete and perfect justice can be done, and brings this action for an accounting between the parties hereto, and to redeem said land from said mortgage and the judgment of foreclosure thereunder and for possession thereof.

In consideration whereof, and forasmuch as your orator can only have adequate relief in the premises in this honorable court, where matters of this nature are properly cognizable and relievable, your orator solicits the aid of this court to compel said defendants a full, true, and perfect answer make to all and singular the statements and charges above set forth, answers under oath, however, being hereby expressly waived by said complainant as to each of said defendants, and that an account may be taken of what, if anything, is due to the said Martha Insley, Laura Guel-
23 ick, Barbury R. Insley, and James M. Palmer, defendants and heirs at law of Polly Palmer, deceased, for principal and interest on said mortgage debt, and that said defendants, heirs at law of Polly Palmer, deceased, be required and directed to marshall their securities, and first subject to the payment of the amount due on the Polly Palmer mortgage and judgment above set out, if any be due, the said lot 3, block 104, it being a part of the property included in their said mortgage and judgment, and sheriff's deed, and on which said lot 3, block 104, the complainant had a lien, and asks that an accounting may also be taken of the rents and profits of said above-described premises, to wit, lot 1, block 104, the property of complainant, which have been possessed or received by said defendants, heirs of Polly Palmer, deceased, or by their order, or for their use, or which without their wilful fault or neglect may have been received, and that if it shall appear that said rents and profits have been more than sufficient to satisfy the principal and interest of said mortgage debt, that then said defendants be decreed to pay the excess to your orator, and that complainant be permitted to redeem said property, it being ready and willing to pay whatever, if anything, shall appear to remain due in respect to principal and interest on said mortgage debt, and that defendants may be adjudged to deliver up the possession of said lot 1, block 104, to complainants or to such persons as it shall direct, free from all incumbrances made by defendants or any of them, and for such other further or different relief as the court shall in equity see proper to grant.

And may it please your honors to grant unto your orator a writ of subpœna issued under the seal of this court, directed to said Martha Insley (formerly Martha Palmer); Laura Guelick (formerly Laura Palmer); Barbury R. Insley (formerly Barbury R. Palmer); & James M.
24 Palmer, heirs at law of Polly Palmer, deceased, Elizabeth McElroy, wife and heir at law of M. McElroy, deceased, & Eliza J. McElroy, Emma G. McElroy, Mary A. McElroy, Henry McElroy, Hilda McElroy, Moses McElroy, William McElroy, & Ethel McElroy, heirs at law of M. McElroy, deceased, and Mrs. Elizabeth McElroy, as administratrix of the estate of M. McElroy, deceased, & E. Nold, therein and thereby commanding them on a certain day, & under a certain penalty therein to be limited, personally to be and appear before your honors in this honorable court, and then and there full, true, direct, & perfect answers make to all and singular the premises. And further to stand to, perform, and

abide such further order, direction, and decree herein as to your honors shall seem meet; and your orator will ever pray.

W. C. PERRY,
United States Attorney for the District of Kansas.
E. L. WARE,
Of Counsel for Complainant.

I consent to filing now July 21, '85.

J. D. MCCLEVERTY.

(Endorsed:) No. 4896. United States vs. James M. Palmer et al. Amended bill, filed July 22, 1885. A. S. Thomas, clerk, by Frank J. Thomas deputy. E. L. Ware.

25 And on this day, to wit, August 19, 1885, the defendants, by their solicitor, filed in the clerk's office of said court their demurrer to the amended bill, which demurrer is in the words and figures following, to wit:

In the United States circuit court for the district of Kansas.

THE UNITED STATES, COMPL'T,
vs.
MRS. MARTHA INSLEY ET AL. DEF'TS. } Demurrer.

Demurrer jointly and severally of the defendants, the heirs of Moses McElroy and James B. Palmer.

These defendants, by protestation, not confessing or acknowledging all or any of the matters or things in the said amended bill of complaint contained to be true in such manner and form as the same are therein set forth and alleged, do jointly and severally demur to said amended bill; and for cause of demurrer shows that it appears by the said complainant's own showing by the said amended bill that said complainant is not entitled to the relief prayed for against these defendants.

Wherefore, and for divers good causes other of demurrer appearing in the said amended bill, these defendants demur thereto, and they pray the judgment of this honorable court whether they shall be compelled to make answer to said amended bill, and they pray to be hence discharged and dismissed with their reasonable costs in this behalf expended.

J. D. MCCLEVERTY,
Sol. for said Def'ts.

26 (Endorsed:) No. 4896. United States vs. Mrs. Martha Insley et al. Demurrer to the amended bill. Filed Aug. 19, 1885. A. S. Thomas, clerk, by Frank H. Holt, deputy. J. D. McCleverty, sol.

Legal notice.

26½ In the circuit court of the United States, district of Kansas.

THE UNITED STATES OF AMERICA, COMPLAINANT,
vs.
MRS. MARTHA INSLEY, MRS. LAURA GUELICK, MRS. BARBURLY R. INSLEY, and MRS. ELIZABET MCELROY, et al., defendants. } In chancery. No. 4896.

Order for appearance of absent defendants.

And now, on this 24th day of June, 1885, being at the June term, A. D. 1885, of said court, it having been made to appear, to the satisfaction of said court, that this is a suit commenced to enforce a lien upon real property within said district, and that Mrs. Martha Insley, Mrs. Laura Guelick, and Mrs. Barburly R. Insley, the defendants herein, are not inhabitants of and have not been found within said district, and have not voluntarily appeared in this suit, on motion of C. L. Ware, solicitor said complainant, it is considered by the court, and ordered, that said defendants above named, be, and they are hereby, ordered and directed to appear and plead, answer, or demur to the complainant's bill of complaint, on or before the first Monday of September, A. D. 1885, being September rules, A. D. 1885, and that in default thereof an order be entered in this cause taking said bill of complaint pro confesso. It is further ordered by the court that at least twenty (20) days before said rule day a copy of this order be served upon the person or persons in possession or in charge of the real property described in complainant's bill of complaint, if any there be. And it appearing to the court that it is not practicable to serve said order upon said named defendants personally, it is further ordered that said order be served upon said defendants by publication thereof, for six consecutive weeks, once in each week, in the Weekly Commonwealth, a weekly newspaper published at Topeka, in said district, the last publication to be at least twenty (20) days before said rule day.

C. G. FOSTER, *Judge.*

J. R. Hallowell, Chas. B. Smith, and C. L. Ware, solicitors for complainant.

27 STATE OF KANSAS,
Shawnee County, ss:

I. N. Baker, being duly sworn, says that he is the book-keeper of the Commonwealth Company, the publishers of The Commonwealth, a weekly newspaper, printed and published in the city of Topeka, county of Shawnee, and State of Kansas, and that the printed notice hereunto annexed was published in said Commonwealth for six consecutive weeks, the first publication of said notice being on the 2nd day of July, A. D. 1885; the second on the 9th day of July, A. D. 1885; the third on the 16th day of July, A. D. 1885; the fourth on the 23d day of July, A. D.

1885; the fifth on the 30th day of July, A. D. 1885; the sixth on the 6th day of Aug., A. D. 1885; and further he saith not.

I. N. BAKER.

Printer's fees, $21.00.
Subscribed and sworn to before me this 15th day of Aug., A. D. 1885.
[SEAL.] F. P. BAKER,
Notary Public.

My commission expires Jan'y 4, A. D. 1888.

(Endorsed:) No. 4896. United States vs. Mrs. Martha Insley et al. Proof of publication filed Aug. 19, 1885. A. S. Thomas, clerk.

28 In the circuit court of the United States, district of Kansas.

THE UNITED STATES OF AMERICA, COMPLAINANT,
vs.
MRS. MARTHA INSLEY, MRS. LAURA GUELICK, Mrs. Barbara R. Insley, and Mrs. Elizabeth McElroy, et al., defendant. } In chancery.

Order for appearance of absent defendant.

And now, on this —— day of June, 1885, being at the June term, A. D. 1885, of said court, it having been made to appear to the satisfaction of said court that this is a suit commenced to enforce a lien upon real property within said district, and that Mrs. Martha Insley, Mrs. Laura Guelick, & Mrs. Barbara R. Insley, the defendant' herein, are not inhabitant' of and have not been found within said district, and have not voluntarily appeared in this suit, on motion of C. L. Ware, solicitors for said complainant, it is considered by the court, and ordered, that said defendants above named be, and they are hereby, ordered and directed to appear and plead, answer, or demur to the complainant's bill of complaint on or before the first Monday of September, A. D. 1885, being September rules, A. D. 1885, and that in default thereof an order be entered in this cause taking said bill of complaint pro confesso. It is further ordered by the court that at least twenty (20) days before said rule day a copy of this order be served upon the person or persons in possession or in charge of the real property described in complainant's bill of complaint, if any there be. And it appearing to the court that it is not practicable to serve said order upon said named defendants personally, it is further ordered that said order be served upon said defendants by publication thereof for six consecutive weeks, once in each week, in the Topeka Commonwealth, a weekly newspaper published at Topeka, Kansas, in said district, the last publication to be at least twenty (20) days before said rule day.

C. G. FOSTER, *Judge.*

(Indorsed:) Circuit court U. S., district of Kansas. No. 4896. The United States of America vs. Martha Insley, et al. Order for appearance of absent defendant. Filed June 18, 1885. A. S. Thomas, clerk.

29 UNITED STATES OF AMERICA,
District of Kansas, ss:

I, A. S. Thomas, clerk of the circuit court of the United States of America for the district of Kansas, do hereby certify the foregoing to be a true, full, and correct copy of order for appearance of absent defendants from the record & papers of said court in the suit of The United States of America vs. Martha Insley et al., No. 4896, in said court.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in Topeka, in said district of Kansas, this 30th day of June, A. D. 1885.

[SEAL.]

A. S. THOMAS, *Clerk*,
By FRANK J. THOMAS, *Deputy*.

30 (Indorsed:) No. 4896. The United States of America vs. Martha Insley et al. Copy of order for appearance of absent defendants. Filed Aug. 24, 1885. A. S. Thomas, clerk, by Frank H. Holt, deputy.

U. S. marshal's return.

Received this writ July 1st, 1885. Served this writ at the county of Bourbon, State and district of Kansas, on the 20th day of July, 1885, by delivering to E. McElroy a true and certified copy of this writ, with all the endorsements thereon, she, the said E. McElroy, being then and there in possession of the real estate described in complainant's bill of complaint in this cause of action.

B. F. SIMPSON,
U. S. Marshal.

Fees, $2.00.

31 UNITED STATES OF AMERICA,
District of Kansas, ss:

At a term of the circuit court of the United States of America for the district of Kansas, begun and held at Topeka, in said district, on Monday, November 23rd, A. D. 1885, proceedings were had and appear of record in words and figures following, to wit:

MONDAY, *December* 14, 1885.

THE UNITED STATES
vs. } 4896.
MRS. MARTHA INSLEY ET AL.

This cause came on to be heard on the demurrer to the complainant's bill of complaint, and was argued by counsel, and thereupon, upon consideration thereof, it is ordered, adjudged, and decreed by the court that said demurrer be, and the same is hereby, sustained. It is further ordered, adjudged, and decreed by the court that the bill of the complainants herein be, and the same is hereby, dismissed, and thereupon the complainant prays an appeal to the Supreme Court of the United States, which application is granted by the court, and said appeal is allowed to the complainant.

32 UNITED STATES OF AMERICA,
District of Kansas, ss:

I, A. S. Thomas, clerk of the circuit court of the United States of America for the district of Kansas, do hereby certify the foregoing to be a true, full, and correct copy from the record of all the proceedings had in said court in the suit of The United States, plaintiff, vs. Mrs. Martha Insley, formerly Martha Palmer, Mrs. Laura Guelick, formerly Laura Palmer, Mrs. Barbara R. Insley, formerly Barbara R. Palmer, and James M. Palmer, heirs at law of Polly Palmer, deceased, Mrs. Elizabeth McElroy, wife and heir at law of M. McElroy, deceased, and Eliza J. McElroy, Emma G. McElroy, Mary A. McElroy, Henry McElroy, Hilda McElroy, Moses McElroy, William McElroy, and Ethel McElroy, heirs at law of M. McElroy, deceased, and Mrs. Elizabeth McElroy as administratrix of the estate of M. McElroy, deceased, and E. Nold, defendants, No. 4896 in said court.

In testimony whereof I hereunto set my hand and affix the seal of said court at my office in Topeka, in said district of Kansas, this 15th day of January, A. D. 1886.

[SEAL.] A. S. THOMAS, *Clerk.*

(Indorsement on cover): No. 221. The United States, appellant, vs. Martha Insley, formerly Martha Palmer; Laura Guelick, formerly Laura Palmer, et al. Kansas C. C. U. S. Filed February 3rd, 1886.

Supreme Court of the United States.

OCTOBER TERM, 1888.

THE UNITED STATES, APPELLANT,
vs.
MARTHA INSLEY AND OTHERS. } No. 221.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

BRIEF FOR THE UNITED STATES.

Supreme Court of the United States.

OCTOBER TERM, 1888.

THE UNITED STATES, APPELLANT,
vs.
MARTHA INSLEY AND OTHERS. } No. 221.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

BRIEF FOR THE UNITED STATES.

This is a bill in equity filed by the United States to be let in to redeem a certain mortgage, hereinafter particularly mentioned, on lots 1 and 3 in block 104 in the city of Fort Scott, Kansas. The original bill was filed on 28th November, 1884 (pp. 1–5).

This bill was demurred to by two of the defendants, Elizabeth McElroy and James B. Palmer (p. 7).

But these proceedings were superseded by the filing of an amended bill on 22d July, 1885 (pp. 11–15).

The amended bill avers that on the 16th October, 1869, the United States recovered judgment for $2,000 against Moses McElroy and Charles Ball.

That on 6th November, 1869, and 9th June, 1870, the property of McElroy was levied on; but both executions were returned unsatisfied for want of a sale.

That on 7th August, 1869, McElroy and wife mortgaged the land in question to Polly Palmer to secure a debt of $3,500.

That on 30th May, 1871, Polly Palmer brought suit against McElroy and wife to foreclose said mortgage, and on 4th October, 1871, judgment was rendered against cElroy and wife for $3,764.16 and for a foreclosure of the mortgage.

That the property in question was sold under said judgment and bought in by Polly Palmer and conveyed to her by the sheriff on 4th January, 1872, and the deed of conveyance duly recorded.

That at the time said foreclosure suit was brought the said land had been levied on under said judgment of complainant, and was being advertised for sale, to take place on 6th June, 1871, and that in fact lot 1 was on that day sold to complainant, there being no other bidders, and that on 16th October, 1871, said sale was confirmed by the United States district court and a deed ordered to be made to complainant.

That complainant was not made a party defendant to and in no way appeared in said suit, although complainant's judgment was a lien on all said property, and that as such judgment creditor complainant brings this suit for the purpose of redeeming said land from the hands of said Polly Palmer, purchaser and mortgagee, as aforesaid.

That on 13th November, 1872, Polly Palmer died, leaving several children as her heirs at law, naming them.

That James P. Palmer qualified as administrator on the estate of Polly Palmer and, having fully administered said estate, was duly discharged from the office of administrator, and that there is now no administrator of said estate.

That in 1881 the said Moses McElroy died intestate, leaving a widow and certain heirs-at-law, who are named.

That Elizabeth McElroy, the widow, qualified as administratrix of the estate of Moses McElroy.

That defendants have refused to disclose what is actually due on the judgment foreclosing the Polly Palmer mortgage, claiming that complainant had no right or interest in lot 1, block 104, and had no right to redeem the same.

Complainant avers that it has been always ready and willing to pay the amount necessary to redeem said lot 1 from said mortgage, and offers to pay what may be necessary for that purpose.

That on 30th October, 1883, the United States marshal conveyed said lot 1 to complainant pursuant to the sale under the execution.

That whatever adverse interest each of the defendants claims is junior and inferior to that of complainant.

That the amount due the estate of Polly Palmer on said mortgage and on said judgment of purchase has long since been paid, and the bill asks

that defendants may be required to show what payments have been made and when they were made.

That at the time of the levy and sale of said lot 1 and of the foreclosure suit there was a large brick store building thereon of the value of $8,000 when the bill was filed; that at the time of said proceedings the building was occupied by Moses McElroy, who carried on business there for a number of years and remained and continued in possession thereof up to his death carrying on said business, and paid taxes thereon all of said years, and that no possession was taken by said Polly Palmer when the sheriff's deed was given to her, and that the annual rental value of lot 1 was and has been ever since $500 a year, and that of lot 3 was and has been ever since $300, making a total annual rental value of $800, which amount should be applied by defendants in satisfaction of the amount due, if anything is due, to the estate of Polly Palmer from the estate of McElroy, deceased.

The bill then prays that an account may be taken of what may be due the estate of Polly

Palmer, deceased; that the estate of Polly Palmer may be required first to exhaust its security on lot 3 before resorting to lot 1, claimed by complainant; that an account may be taken of the rents and profits received by the estate of Polly Palmer, and that if the same should be more than sufficient to pay the debt and interest, so much shall be decreed to be paid complainant, and that complainant may be let in to redeem, and that said lot 1 may be decreed to be surrendered to complainant free from all incumbrances made by defendants, and for such other, further, or different relief as the court shall in equity see proper to grant.

The heirs of Moses McElroy and James B. Palmer demurred to the bill on the ground that it shows no case for relief (p. 15).

On the 14th December, 1885, the court sustained the demurrer and ordered the bill to be dismissed (p. 18).

ASSIGNMENT OF ERROR.

The decree is erroneous, in this, that the demurrer should have been overruled.

ARGUMENT.

At the time Polly Palmer brought her foreclosure suit against McElroy and wife, namely, 30th May, 1871, the United States had a lien on the equity of redemption of the property covered by the mortgage by virtue of a judgment against McElroy and one Charles Bull, rendered by the district court of the United States for the district of Kansas on 16th October, 1869, and said property had then for the third time been levied on, and was then for the third time being advertised for sale when the foreclosure suit was instituted, and was *finally*, on 6th June, 1871, purchased by the United States at the execution sale, which sale was confirmed by the United States district court on 16th October, 1871, and a deed ordered to be made to the purchaser, which deed, however, was not made until about 30th October, 1883.

The proper and necessary steps having been taken to make the judgment of the United States a lien on the real estate of the judgment debtor McElroy, as the bill avers, it is thus manifest

that a substantial and important interest in the equity of redemption, owned by the United States, was not in any way represented in the foreclosure suit, and it follows, as a necessary consequence, that the equity to redeem the mortgage stands, as to that unrepresented interest, entirely unaffected and unforeclosed; for, to employ the language of this court in *Howard* v. *Railway Co.* (101 U. S., 837, 848), "Subsequent incumbrancers, when not made parties to a bill for foreclosure or sale, are not bound by the decree." (*Clark* v. *Reyburn*, 8 Wall., 318, 324; *Terrell* v. *Allison*, 21 Wall., 289, 293.)

It is true, as is said in the opinion of the court below, that the United States could not have been made a party to the foreclosure proceedings, it not having given its consent to be sued in that way; but certainly that immunity of the Government from suit is not to be used as a reason for disregarding a plain rule of natural justice, nor is it understood that any such unreasonable ground was taken by the defense in the court below.

The case, then, is one that comes under a familiar head of equity jurisdiction; and the principle is well established, that any one having an interest in the equity of redemption may file a bill to redeem; but the court below, instead of overruling the demurrer, and requiring the defendants to answer, sustained the demurrer, on the ground that it was so great laches in the United States not to have filed its bill until more than twelve years after the date of the sheriff's deed to Polly Palmer under the foreclosure sale, that a court of equity could not now entertain a bill to redeem; the court holding that when the United States comes into equity it is bound by the doctrine as to laches which is constantly enforced there against individuals. The opinion of the learned judge of the court below concludes in these words:

> I hold, therefore, that the claim of the Government is barred by its own laches, and that the demurrer must be sustained and the bill dismissed. (25 Fed. Rep., 804: see, also, the opinion in the appendix of this brief).

It would seem clear, from the opinion of the court below, that the decree in this case was the result of the opinion of Judge McCrary in United States *v.* Beebee. (17 Fed. Rep., 17.)

In the case just cited, it was laid down that laches was a good defense to a bill filed by the United States, and the doctrine of the court thus applied was afterwards sanctioned by this court (United States *v.* Beebee, 127 U. S., 338) in so far only, however, as cases were concerned in which the United States is a nominal party, having no substantial interest in the subject of the suit, and, consequently, where the litigation is virtually between private persons, but in so far as the reasoning of the circuit court applied to cases in which the United States has a substantial interest, it met with this court's distinct and emphatic repudiation, as appears by the following paragraph from the opinion of this court in United States *v.* Beebee, *supra:*

> The principle that the United States are not bound by any statute of limitations, *nor barred by any laches of their officers, however gross*, in a suit brought by them as a sovereign Government to enforce a public right, or to assert a public interest, is established past all controversy or doubt (*United States* v. *Nashville, &c., Railway Company*, 118 U. S., 120, 125, and cases there cited). But this case stands upon a different footing, and presents a different question. The question is: Are these defences available to the defendant in a case where the Government, although a nominal complainant party, has no real interest in the litigation, but has allowed its name to be used therein for the sole benefit of a private person?

This case being one where the United States filed the bill for the protection of its property

rights, and not at the relation or for the use of a private person, the equitable doctrine of laches, as applied by the court below, has no relevancy to the case made in the bill, and affords no support to the demurrer. On this point, the case of United States *v.* Beebee (*supra*), decided some time after the decree in the case at bar was entered, no longer leaves any room for argument.

The justice of the case would seem, therefore, to require that the decree should be reversed.

WM. A. MAURY,
Assistant Attorney-General.

APPENDIX.

UNITED STATES *v.* MCELROY AND OTHERS.

Circuit Court, D. Kansas, December 16, 1885.

MORTGAGE—FORECLOSURE OF—RIGHT OF GOVERNMENT TO REDEEM—STATUTE OF LIMITATIONS—LACHES.

Neither the statute of limitations nor laches will bar the Government as to any claim for relief in a purely governmental matter; but when the Government comes as a complainant into a court of equity, asserting the same rights as an individual—a mere matter of dollars and cents, involving no question of governmental right or duty—although technically the statute of limitations may not bar, the ordinary rules controlling courts of equity as to laches should be enforced. (*United States v. Beebee*, 17 Fed. Rep., 37, followed.

IN EQUITY.

W. C. Perry and *C. F. Ware*, for complainant.
J. D. McCleverty, for defendant.

BREWER, J.: This is a bill brought by the Government to redeem. The facts are these: On August 7, 1869, one Moses McElroy was the owner in fee of a lot in Fort Scott. On that day, for value, he executed a mortgage for $3,500 to one Polly Palmer. On the sixteenth day of October, 1869, the present complainant recovered a judgment of $2,000 in the United States district court for this State against said McElroy. On November 6, 1869, execution was issued on this judgment

and levy made upon said lot; said execution was returned unsatisfied for want of bidders at the sale. On a subsequent execution, and on May 30, 1871, said lot was sold at the front door of the court-house in the city of Fort Scott to the present complainant, and on October 16, 1871, said sale was confirmed and deed ordered made to the complainant. On May 30, 1871, said mortgagee, Polly Palmer, commenced a foreclosure suit in the district court of Bourbon County, and on October 4, 1871, decree of foreclosure was rendered in her favor. Thereafter the property was sold under that foreclosure, and on January 4, 1872, the sheriff's deed was executed and delivered to said mortgagee, Polly Palmer, and duly filed for record in the office of the register of deeds in Bourbon County, Kansas. In that foreclosure proceeding the present plaintiff was not made a party, and indeed could not be without its consent. Both the mortgagor and mortgagee have since deceased, leaving heirs, as against whom this bill to redeem is filed.

The bill in this case was filed November 28, 1884, more than 12 years after the sheriff's deed in foreclosure to Polly Palmer, and more than 13 years after the sale to the Government on the execution. To this bill a demurrer has been filed, and the question presented is whether, by laches or limitation, the plaintiff is barred of any remedy. Unquestionably, if the plaintiff was a private individual, the statute of limitations would cut off all right to redeem; but it is said that the statute of limitations runs not against the Government. This is unquestionably true, and it may also, for the purposes of this case, be conceded that neither the statute of limitations nor laches bar the Government as to any claim for relief in a purely governmental matter; but when the Government comes as a complainant into a court of equity, asserting the same rights as a private individual—a mere matter of dollars and cents, involving no questions of governmental right or duty—it seems that, although technically the statute of limitations may not bar, the ordinary rules controlling courts of equity as to the effect of laches should be enforced. In the

case of *U. S. v. Beebee*, 17 Fed. Rep., 37, this rule was laid down by the circuit court of this circuit:

> Lapse of time may be a sufficient defense to a suit instituted in the name of the United States. When the Government becomes a party to a suit in its courts it is bound by the same principles that govern individuals. When the United States voluntarily appears in a court of justice, it at the same time voluntarily submits to the law, and places itself upon an equality with other litigants.

I think that doctrine eminently just and correct. It is especially true in a case like this. The Government could not, except at its own will, be made a party to any foreclosure suit. When a complainant is therefore, in a foreclosure suit, unable to compel the appearance of the Government or to have its rights adjusted and foreclosed, it would be cruel to hold that a party standing, by its own will, aloof from the power of the courts could bide its time, and after the lapse of many years, when property values have changed, when parties have acted in the faith of perfect title, come into a court of equity and say that all these proceedings go for naught so far as title is concerned, and now claim a property which, by the combined efforts and action of many individuals, among whom is such complainant, has been largely increased in value. I hold, therefore, that the claim of the Government is barred by its own laches, and that the demurrer must be sustained and the bill dismissed.